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Opinion of Examiner of Interstate Commerce Commission in Joint Hearing in the Proceeding at Bar.....III–XXX

In The
Supreme Court of the United States

October Term, 1942

No.....

NEVADA CONSOLIDATED COPPER CORPORATION,
NEVADA NORTHERN RAILWAY COMPANY, and
KENNECOTT COPPER CORPORATION,

Petitioners,

vs.

RAILROAD RETIREMENT BOARD,
RAILWAY LABOR EXECUTIVES ASSOCIATION, and
BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered July 27, 1942, rehearing denied August 11, 1942.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit, (R. 433) is reported in 129 Fed. (2d) 358. The opinion of the District Court of the United States for the District of Colorado (R. 80) is reported in 41 Fed. Supp. 763.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 27, 1942 (R. 442). A petition for rehearing was denied August 11, 1942, (R. 451). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Certain workers are hired and paid by a copper mining company to haul its ore in its ore trains from the mine to its reduction works for processing. The ore is transported over railroad tracks owned by a carrier, under a trackage license granted in 1920. To comply with regulatory statutes and rules enacted by national and state authorities, and in the interest of practical efficiency, economy and coordination, the workers engaged in the ore haulage have been subjected to the carrier's general supervision and direction. But the ultimate power to hire and discharge these ore haul workers rests with the mining company.

Are the ore haul workers employees in the service of the carrier for compensation within the meaning of the Railroad Retirement Act?

STATUTE INVOLVED

The pertinent provisions of the Railroad Retirement Act of 1937, as amended, 50 Stat. 307, 54 Stat. 264, 785, 786, 1100, 45 U.S.C. Sec. 228a, are as follows:

> "(a) The term 'employer' means any carrier (as defined in subsection (m) of this section), * * * and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer * * *"

"(b) The term 'employee' means (1) any individual in the service of one or more employers for compensation, (2) any individual who is in the employment relation to one or more employers, and (3) an employee representative. The term 'employee' shall include an employee of a local lodge or division defined as an employer in sub-section (a) only if he was in the service of or in the employment relation to a carrier on or after the enactment date."

"(c) An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation: * * *"

* * *

"(h) The term 'compensation' means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost."

* * *

"(l) The term 'employee' includes an officer of an employer.

"(m) The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to Chapter 1 of Title 49."

STATEMENT

The petitioner, Kennecott Copper Corporation, owns a large open pit copper mine situated at or near Ruth, Nevada, six miles westerly of Ely, and a mill and smelter at McGill Nevada, about twenty-two miles easterly from Ruth and sixteen miles easterly from Ely. These properties are operated by the petitioner, Nevada Consolidated Copper Corporation,

which is a managerial and operating agent and a wholly owned subsidiary of Kennecott Copper Corporation. (R. 190, 192, 193) The petitioner Nevada Consolidated Copper Corporation, the agent, and Kennecott Copper Corporation, the principal, and the latter's predecessors in interest in the title to the mining property, are hereinafter referred to indiscriminately as the "Mining Company". The petitioner Nevada Northern Railway Company, hereinafter called the "Carrier", is a common carrier. It owns and operates a line of railroad from Cobre, Nevada, on the line of the Southern Pacific Company, south approximately one hundred thirty-five miles to Ely, Nevada, and also from Ruth over the distance of twenty-two miles to McGill. (R. 189) The Carrier was organized and the railroad was built to provide transportation between the plant of the Mining Company and the transcontinental railroads for materials and supplies required by the industry and for its product out to the refineries on the eastern seaboard and the market. (R. 251) The railroad reached Ely in 1907, and in 1908 the first blister copper was produced in the treatment plants. The outstanding stock of the Carrier has been owned by the Mining Company always. (R. 189)

The Mining Company has carried on two types of mining, (1) an underground mine at Ruth, and (2) an open pit or surface mine in the same vicinity. In the first operation the ore is broken down by a caving method and hoisted vertically through a shaft to the surface, where it is loaded into standard railway cars and hauled a short distance to the assembly yard at the entrance to the open pit mine. In the second operation, the ore is loaded into cars by power shovels in an open pit and hauled out of the pit to the assembly yard. (R. 190-191) The cars, loaded with ore, are hauled from

the assembly yard in 24 to 32 car trains the distance of twenty-two miles to McGill, where the reduction plants are located. (R. 193) The pit crews bring the cars up out of the pit, set them in the assembly yard, and make them up into trains, along with the cars of ore from the underground operation. (R. 34, 35, 45, 46, 190, 209) The ore delivery crews haul the trains to McGill, where they are left in the concentrator ore yard, and an electric locomotive then picks them up in trains of 12 or 14 cars and delivers them to the concentrator, from which the concentrates are handled to the smelter by still other locomotive crews of the Mining Company. From the smelter the blister copper is moved in cars to the yard of the Mining Company near the depot of the Carrier, where the bars of blister copper are loaded into box cars, foreign cars furnished the Mining Company at this point by the Carrier. These loaded box cars are then made up into trains by the Carrier's crews and are hauled away to connections with transcontinental railroads, under the Carrier's published tariffs and as a part of the Carrier's common carrier operation. (R. 213, 214, 215)

The tracks in the pit and in the plant yards at McGill are owned by the Mining Company, but the tracks in the assembly yard at the pit and thence to McGill are owned by the Carrier. (R. 211) All of the locomotives, engines, cars and equipment used in the movement of ore in the mine and from the mine to the point of delivery of blister copper to the Carrier are owned by the Mining Company. The ore movement over the tracks of the Carrier since September 1, 1920 has been pursuant to a trackage license (Ex. 18E, R. 195, 323) granted the Mining Company by the Carrier, and none of the material moved has come into the Carrier's possession until delivery

by the Mining Company to the Carrier of the box cars loaded with blister copper for shipment to the refineries. (R. 192, 193, 196, 197, 209, 211) Prior to September 1, 1920 the ore was transported from the mine to McGill by the Carrier under its published tariffs. (R. 218) After September 1, 1920, when the trackage license went into effect, the work performed by the ore delivery crews in the hauling of ore from mine to the plant yards at McGill has been the work of the Mining Company. (R. 210, 273) When that change took place the Mining Company purchased the cars and engines that had been used by the Carrier in the ore haulage, and the workers who had been therein employed by the Carrier were employed anew by the Mining Company, and were thereafter paid by the Mining Company. (R. 206, 219, 270, Ex. 23E, R. 202, 360, Ex. 29E, R. 283, 382, 269).

Under the trackage license effective September 1, 1920 (Ex. 18E, R. 195, 323) the Mining Company was granted the right to transport the ore over the line of the Carrier, which license was to be exercised in harmony with the conduct by the Carrier of its common carrier operation and with the operations of others to whom similar licenses might be granted (R. 324) The agreement provides that the Mining Company "will itself perform its interindustry service of transporting its" ores from mine to reduction works; that the Mining Company should assume the risk of damage to itself and to third persons suffered in the Mining Company's operations upon the Carrier's tracks; that each party should save the other harmless from loss caused by the negligence of its employees; that in case of collision between their respective engines, cars or trains, the party whose employees were alone at fault should be solely responsible; (R. 325) that in case any of the

trains of the Mining Company should be wrecked while running on the Carrier's tracks under this license, the wreck should be picked up and moved by the Carrier at the Mining Company's cost, etc. And it was further provided that the Carrier should dispatch the trains of both parties; that the trains of the Carrier should be given precedence over the trains of the Mining Company; that all time cards, rules and regulations promulgated by the Carrier for the movement of trains should be reasonable and without unreasonable preference in favor of the Carrier as against the Mining Company, but that the Carrier's obligations to the public as a common carrier were paramount. (R. 327) And it was provided that the Carrier should be compensated by the Mining Company for the latter's use of the Carrier's tracks by payment to the Carrier on a wheelage basis calculated as in the agreement provided; that all expenses connected with the operation of stations and yards, wages of gatemen, towermen, signalmen, switchmen, train dispatchers, telegraph operators, etc., and such proportion of the general and other expense of maintenance and operation of the Carrier's line of railroad as were properly chargeable to that portion thereof over which the Mining Company operated under this license, should be divided between the parties on the basis of their use respectively, based on loaded and empty car mile movement. (R. 332) And it was the clear intent and purpose of that trackage license agreement and of the parties thereto that each should have its own set of employees and by them operate its own trains and perform its own work.

The average annual percentage of the Mining Company's tonnage hauled over the tracks of the Carrier to the total tonnage handled over those tracks, for the years 1910 to and

including 1939, varied from a low of 97.72% in the year 1930 to 99.48% for the year 1936. Included in Mining Company's tonnage was not only that of the ore moved under the trackage license, but all other tonnage of the Mining Company moved as commercial freight under the Carrier's published tariffs and not within the provisions of the trackage license. (R. 276-277)

The trackage license went into effect September 1, 1920, and since that time the personal records of the workers engaged in the ore haulage have been made up and preserved upon the Mining Company's standard forms. Their physical examinations have been made by the Medical Department of the Mining Company. Such supervision and direction as has been exercised by the Carrier over them has been at the instance of the Mining Company in the course of Mining Company's work, and the Carrier has supplied such supervision as the agent of the Mining Company, and the Carrier has been paid by the Mining Company for that service. (R. 198-209, 257-263, 264, 265) Since the trackage license's effective date the workers engaged in the ore haul never have been granted free or reduced transportation privileges, such as have been afforded the employees of the Carrier. (R. 252, 270) The Carrier has borne no portion of the expense due to accident or illness of the ore haul employees or their families, and such expense has been borne by the Mining Company. As to seniority, the workers in the ore haul have been separately listed, having their own seniority list as employees of the Mining Company, and the Carrier has kept and posted a seniority list for its employees only. No discharge by Carrier officials of workers in the ore haul has or could become final until Mining Company's General Man-

ager had concurred, and such was the procedure followed by Mining Company in the discharge of employees engaged in any other of Mining Company's operating departments. The employees in the ore haul have borne the same relation to Mining Company as any other employees of Mining Company in the mine or reduction works. (R. 264-272, 292, 293) All workers in the ore haul, like all other employees of Mining Company, whether at the mine, at the mill or at the smelter, have been reported as employees of the Mining Company to the Nevada State Industrial Commission and as Mining Company employees they have received the protection from this institution that is provided by law. (Nevada Industrial Insurance Act, Vol. 2, Nevada Compiled Laws 1929, §2680, et seq.) The workers in the ore haul have been reported by Mining Company under the Federal Social Security Act, (42 U.S.C. §301, 49 Stat. 620, 26 U.S.C. §1400 et seq.) and Mining Company has paid the tax and has deducted from the wages of those workers the percentage required by that Act. And the workers in the ore haul have been reported as subject to the Fair Labor Standards Act of 1938 (29 U.S.C. §§201-219) and their hours of employment have been limited to the statutory time prescribed by that Act. (R. 208, 209) The workers engaged in the ore haulage are employed by Mining Company only, and increase and reduction in force has been made pursuant to the direction of Mining Company. (R. 210, 211, 229-230, 264) The workers in the ore haul have at all times conducted themselves unequivocally as employees of the Mining Company and not as employees of the Carrier. All discharges of such employees have been referred to the Mining Company's General Manager and by his action only have they become final. The workers in the ore haul, entitling

themselves as employees of the Mining Company, have directed grievances to the local Union of the International Union of Mine, Mill and Smelter Workers, and to the General Manager of the Mining Company instead of and as distinguished from an official of the Carrier, and as employees of the Mining Company have sought preferential treatment, and have reported to the General Manager of the Mining Company upon the condition of equipment used in the ore haul and have transacted their business with Mining Company's General Manager as distinguished from an official of the Carrier. The Mining Company has at all times possessed and exercised the ultimate and final control of the workers engaged in the ore haulage and the fact that such ultimate and final control reposed in Mining Company and not in the Carrier was known and clearly understood by those workers. (R. 281-292, 305-308)

The extent to which the Carrier has exercised supervisory authority over the workers in the ore haulage has been only that which has been customary for the owning carrier to exercise over a licensee upon the carrier's tracks. (R. 265, 266, 267) Such supervision is necessary to avoid violation of the regulatory acts and rules imposed by national and state authority,* and to adequately protect the owning carrier in the latter's performance of its duty to the public.

*Under the Accident Report Acts of May 6, 1910, U.S.C. Title 45, Section 38, the carrier is required to make to the Interstate Commerce Commission full and complete reports of all accidents and to submit to investigations thereof by the Interstate Commerce Commission. By the Ash Pan Act of May 30, 1908, U.S.C. Title 45, Section 17, it is made unlawful to use on the common carrier tracks any locomotive not equipped with an ash pan that can be dumped or emptied and cleaned otherwise

(Continued on page 11)

Over the past twenty-two years the trackage agreement and its application, the charges made thereunder and the apportionment of them, have been the subject of careful consideration by the representatives of the Interstate Commerce Commission, and the agreement, as well as the operation thereof, has been approved in all respects. (R. 273, 274, 260, 299)

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than by employees going under such locomotive. By the Boiler Inspection Act of February 17, 1911, as amended June 7, 1934, U.S.C. Title 45, Section 22, the carrier is required to equip its locomotives with safe and suitable boilers and appurtenances and the carrier is denied the right to permit to be used on its lines any locomotive unless the same, its boiler, tender and all parts and appurtenances thereof, are in proper condition for safe operation; and it is further required by that Act that such locomotives, boilers, tenders, parts and appurtenances must be inspected from time to time and be able to withstand the tests prescribed by the rules and regulations of the Interstate Commerce Commission. By the Hours of Service Act of March 4, 1907, as amended, U.S.C. Title 45, Section 61, it is made unlawful to permit any men to be or remain on duty on the Railway Company's common carrier tracks for a longer period than 16 consecutive hours, etc. By the Safety Appliance Act of March 2, 1893, as amended, U.S.C. Title 45, Section 1, it is required that all cars operated over common carrier tracks must be equipped with automatic couplers and continuous brakes and with other appurtenances deemed necessary to the safe handling of cars and locomotives. By Title 49, U.S.C. Section 26, as amended, it is provided that each carrier shall install upon its railroad such safety devices as the Interstate Commerce Commission shall order to promote the safety of railroad operation, and each carrier is required to formulate and file with the Commission its rules, standards and instructions for the installation, inspection, maintenance and repair of such safety devices, the same when approved by the Commission to become obligatory upon the carrier. And each carrier is required to report to the Commission, failure of such safety devices upon its line of railroad.

(Concluded on page 12)

On June 20 and 21, 1939, a joint hearing was held at Ely, Nevada, before an examiner of the respondent Board and an examiner of the Interstate Commerce Commission, this with relation to workers engaged in the ore haul conducted by the Mining Company over the tracks of the Carrier between Ruth and McGill, Nevada. The respondent's examiner was authorized to determine whether the employees were subject to the Railroad Retirement Act, and the examiner of the Interstate Commerce Commission was directed to determine whether they came within the definition of "employee" in the Railway Labor Act as amended. (44 Stat. 577, 45 U.S.C. §151)* The respondent Board concluded that

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By Section 6357.01, Nevada Compiled Laws 1929, supplement 1931-1941, a carrier may not permit to be operated over its line of railroad a train of cars of greater number than that thereby prescribed. By Section 6134, Nevada Compiled Laws 1929, as amended 1937, provision is made for the reporting to the Public Service Commission of accidents occurring on the carrier's railroad. By Section 6117, Nevada Compiled Laws 1929, the Public Service Commission is empowered to require the carrier to install safety appliances, equipment and improvements. By Nevada Compiled Laws 1929, Sections 6318, 6319, 6320, 6322, it is made unlawful for the carrier to operate or to permit to be operated on its railroad any trains with less than the specified full crews. By Section 6332, Nevada Compiled Laws 1929, every carrier is required to install upon each locomotive operated on its line a headlight of stated specifications. By Section 6335, Nevada Compiled Laws 1929, it is made unlawful for a carrier to permit stated employees to remain on duty for a longer period than that stated. By Section 6276, Nevada Compiled Laws 1929, it is required that a bell of stated weight be placed on each locomotive and be rung at a stated distance from each crossing under penalty for neglect to be paid by the carrier owning the railroad.

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*The examiner for the I.C.C. held that the ore haulage workers were not employees of the Carrier, but were employees

(Concluded on page 13)

the Mining Company at all times had been engaged in a commercial mining business, that it had not operated as a carrier by railroad subject to Part I of the Interstate Commerce Act, (R. 40, 41) but that since September 1 ,1920, the workers engaged in the ore haulage conducted under the trackage license effective upon that date, for which services they had been compensated by the Mining Company, "have been subject to the continuing authority of the Nevada Northern to supervise and direct the manner of rendering such service" and that "such individuals have been 'in the service of' the Nevada Northern with respect to such service within the meaning of the Railroad Retirement Acts of 1935 and 1937"; that "accordingly, such individuals are and have been 'employees' of the Nevada Northern with respect to such service within the meaning of the Railroad Retirement Act of 1937, and they have been 'employees' of the Nevada

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of the Mining Company. To preserve the discussion of the examiner for the I.C.C. his report is set out at length in the appendix hereof. Exceptions to the Examiner's Report were taken by the Brotherhood of Locomotive Engineers and the Brotherhood of Railroad Trainmen. Division 3 of the I.C.C., Commissioner Patterson dissenting, dismissed the Brotherhoods' exceptions on the ground that the Commission had no jurisdiction to determine whether the workers were in the employment of the Carrier or the Mining Company. (246 I.C.C. 757) The Brotherhoods filed a petition for rehearing and reargument before the entire Commission, and the Commission has set the case for reargument on October 19, 1942. The definitions of "employee" in the Railroad Retirement Act and the Railway Labor Act are substantially identical. If the Commission persists in its well-settled policy of refusing to determine whether certain employees are within the Railway Labor Act (245 I.C.C. 415, 246 I.C.C. 703) or if it confirms the report of its examiner, there will exist a conflict with respect to the status of these employees.

Northern within the meaning of the Railroad Retirement Act of 1935 . . .". (R. 41)

On February 19, 1941, the petitioners filed in the United States District Court for the District of Colorado their complaint (R. 7) against respondent, the Railroad Retirement Board, to compel the Board to set aside its decision on the ground that it violated the petitioners' legal rights. The District Court dismissed the action. (R. 86) The Circuit Court of Appeals for the Tenth Circuit affirmed the judgment of dismissal. It decided that the District Court had erred in holding that the decision of the Board on the question of its jurisdiction over these employees was final because supported by competent evidence. But after an independent examination of the record, the court held that the ore haul workers were employees within the Railroad Retirement Act on the ground that they were under the supervision and control of the Carrier and thus under the continuing authority of an employer within the meaning of subsection (c). (R. 441)

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals for the Tenth Circuit has decided important questions of Federal law* which have not been, but should be, settled by this Court. This case and the companion Utah case are the first to raise significant

*We do not question the lower court's holding upon the scope of judicial review of the respondent's orders. We merely mention it to show that the decision below involves questions concerning the administration of an important Federal statute, which are of great concern to employers and to the Railroad Retirement Board as well.

issues of statutory construction under the Railroad Retirement Act. The meaning and application of the terms "employer" and "employee", as defined in Section 1 of the Act, not only delimit the area of its impact upon the American economy, but also determine the jurisdiction of the Railroad Retirement Board and Social Security Board. These are serious questions for many employees and employers, including the petitioners. Carriers must of necessity supervise the operations of others over their tracks. The Interstate Commerce Commission must approve licenses and trackage licenses uniformly provide for such supervision.*

Moreover, the petitioners are engaged in a desperate effort to meet the mounting demands of the war production program. The decision of the lower court upsets relationships of more than twenty years' standing which, as will be shown below, have been repeatedly sanctioned by Federal and State authority. Important executives will be compelled to divert their attention from the difficult tasks of production to study the effect of the decision upon the petitioners, particularly in the light of many Federal and State regulatory statutes, and to consideration of the adjustments or even

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*The Bureau of Finance, Interstate Commerce Commission, has jurisdiction over trackage licenses. We have been informed by the Bureau that no trackage license has been seen in which the lessor does not exercise control or supervision. See also footnote, p. 22, infra. The duty to effectively supervise the operation of others over the carrier's tracks is imposed upon the carrier as the result of the Acts of Congress and the Statutes of the State of Nevada, to which reference is supplied by the footnote at page 10, and by the further practical necessity of protecting the carrier's ability to perform its own obligation to the public.

possible reorganization which the decision may render necessary. For instance, are the ore haul workers employees of the Carrier under the Railroad Retirement Act but employees of the Mining Company for all other purposes? Are they employees of the Carrier under any other Act? Are they employees of the Mining Company for any purpose? What of the National Labor Relations Act (29 U.S.C. Sections 151-63); Railway Labor Act, as amended (45 U.S.C. Section 151); Fair Labor Standards Act (29 U.S.C. Section 201, et seq.); Federal Employers' Liability Act (45 U.S.C. Section 51, et seq.)? What of the recent order of the War Manpower Commission, 7 Fed. Reg. 7131, stabilizing employment in non-ferrous metals activities in Nevada? It seems incredible that because the Carrier has immediate supervision over the ore haul workers, it is their employer under the Railroad Retirement Act. They are also under the mediate supervision of the Mining Company. It has the final say in hiring and discharging them; it pays their compensation. Finally, these men do the work of the Mining Company — they render "service" to that company, not to the Carrier. Clearly, under the statute they are employees of the Mining Company.

2. The Circuit Court of Appeals for the Tenth Circuit has decided a Federal question in a way in conflict with the decisions of this Court. It has held that the ore haul workers are employees of the Carrier because subject to its supervision; this, despite the recognition by both the Mining Company and the workers of the fact that the Mining Company is their employer, (Ex. 23 E., R. 202, 360; Ex. 29E., R. 283, 382, 269; R. 281-292, 305-308) of the fact that the hauling of ore is by workers for the Mining Company (i.e., the service

is clearly that of the company), that the payment of the workers' compensation is by the Mining Company and of the fact that the Mining Company ultimately has the power to hire and retain or discharge. The decision of the lower court magnifies one phrase of subsection (c) and ignores completely the remainder of that subsection. Under it, to be in the service of an employer, an individual must not only be subject to his supervision, but he must be subject to supervision of "his service" by the employer, "which service" he renders to the employer "for compensation" from the employer. These additional factors are basic, not only in the Railroad Retirement Act but in other Federal Statutes.

The Federal Employers' Liability Act, 45 U.S.C. Section 51, provides that interstate railroads shall be liable "to any person suffering injury while he is employed by such carrier in such commerce" by reason of its negligence or defective equipment. This Court has held that an individual is not employed by a carrier simply because he may be subject to its supervision. Thus, in *Hull* v. *Philadelphia & Reading Ry. Co.*, 252 U. S. 475 (1920), an individual hired by one railroad was killed while on the property of the defendant's railroad tracks. Under an agreement for through traffic between the two railroads it was provided that train crews should be subject to the rules, regulations, discipline and orders of the railroad which owned the line on which they were operating. This Court held that the deceased did not become an employee of the defendant simply because he was subject to its supervision. He remained the employee of the railroad which hired him because what he did upon the line of the defendant was done as part of his duty to the other railroad which first

employed him. In *Robinson* v. *Baltimore & Ohio Ry. Co.*, 237 U. S. 84 (1915), the plaintiff, a Pullman porter on defendant's train was subject to the rules and regulations of the defendant. This Court held that he was not for that reason alone an employee of the defendant. See also *Standard Oil Company* v. *Anderson,* 212 U. S. 215 (1909); *Linstead* v. *Chesapeake & Ohio Ry. Co.,* 276 U. S. 28 (1928). For conflict with decisions of other Circuit Courts of Appeal in similar situations, *Docheney* v. *Pennsylvania Ry. Co.,* 60 Fed. (2d) 808 (C.C.A. 3, 1932), cert. den., 287 U. S. 665 (1932); *Bowman* v. *Pace,* 119 Fed. (2d) 858 (C.C.A. 5, 1941).

3. There is a contradiction between the decision of the Court below and the decisions of the Interstate Commerce Commission whereby have been construed the like provisions of the Railway Labor Act. The definitions of "employer" and "employee" under the Railway Labor Act and the Railroad Retirement Act are the same (45 U.S.C. Section 151, First and Fifth). In fact, the Interstate Commerce Commission participated in the joint hearing in the proceeding at bar under the provisions of the Railway Labor Act.

The Board and the Court below concluded that the ore haul workers were subject to the continuing authority of the Carrier to supervise and direct the manner of rendering their service, and that, hence — quite regardless of fact — that these workers are "in the service of" the Carrier, and, hence, that the Carrier is the "employer". We respectfully submit that is not what the Act provides; the Act does not attempt to define as an employment relationship one that in fact does not exist. It does not follow that merely because

the Carrier may exercise over a worker the continuing authority described, the worker is in the Carrier's service. The ore haulage here involved is not in fact a Carrier service and the compensation for the service is not paid by the Carrier. The workers therein engaged, therefore, cannot be in the service of the Carrier.

The examiner for the Interstate Commerce Commission in the proceeding at bar held that under the substantially identical provisions of the Railway Labor Act the ore haul workers are not employees of the Carrier. He said:

> "The statute here under consideration is the Railway Labor Act. In order to be a railway employee within the meaning of that Act, a worker must be in the service of a carrier. The ore-line workers are not in the service of the Nevada Northern, because the work they do is the work of the copper company. The Nevada Northern does not transport the ore tonnage, and is without authority to do so. Hence, the ore-line service cannot accurately be termed the work of a railroad employee". (Appendix, p. XX).

and again,

> "The provisions of the Railway Labor Act are of a positive and definite character. The line of demarcation between individuals who are railway employees, and those who are not railway employees, is quite sharp and clear.
>
> "To be a railway employee within the meaning of the Railway Labor Act, the worker must be in the service of a carrier. A rail carrier is defined by the Railway Labor Act as a railroad which is subject to the Interstate Commerce Act. The Nevada Northern Railway is a carrier of that type, but the copper company is not. * * * (Appendix, p. XXVI).
>
> "Inasmuch as the copper company is not a carrier, within the meaning of the Railway Labor Act,

> the only way the ore-line workers can legally be classified as railway employees is to find that they are in the service of the Nevada Northern. * * * To hold that the ore-line workers are in the service of the Nevada Northern, it must be found that the movement of the ore trains is railroad transportation service which is performed by that carrier. And it cannot accurately be said, as a matter of fact or as a matter of law, that the ore tonnage is moved by the Nevada Northern. At no time does this carrier have actual possession, or legal possession or custody of the ore tonnage. At no time does it transport, or have authority to transport that tonnage. It follows that the ore-line workers are not in the service of, and are not employees of, the Nevada Northern. (Appendix, p. XXVII).

And again,

> "Counsel for the participating parties entertain different views concerning the meaning of Section 1, paragraph 5, of the Railway Labor Act. * * * That statute provides three tests by which to identify the workers who are subject to its provisions. First, the individual must be in the service of a carrier. Second, the carrier must have continuing authority to supervise the service which the individual renders. Third, the work which the individual performs must be defined by this Commission as the work of a railroad employee or subordinate official. To be an employee within the meaning of the Railway Labor Act, an individual must pass all three tests. The ore-line workers involved in the instant proceeding are not even employees under the first test, because they are not in the service of a carrier as that term is defined by the Railway Labor Act. Nor are they railway employees within the meaning of the 1938 Fair Labor Standards Act." (Appendix, p. XXIX).

Such is the construction by the Interstate Commerce Commission of the Railway Labor Act, in Ex Parte No. 72 (Sub. No. 1), In the Matter of Regulations Concerning the Class

of Employees and Subordinate Officials to be Included within the Term "Employees" under the Railway Labor Act, Elevator Starters and Operators, and Information Clerks, Hudson & Manhattan Railroad Company, decided May 6, 1941, 245 I.C.C. Rep. 415. The Commission's interpretation of the words "in the service of", essential to the Railway Labor Act's definition of the term "employee", is the same as that of the examiner for the Interstate Commerce Commission in the proceeding at bar. To the same effect is Interstate Commerce Commission's Ex Parte No. 72 (Sub. No. 1), In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials to be Included within the Term "Employee" under the Railway Labor Act, Ore Dock Foremen and Laborers, decided October 6, 1941, 246 I.C.C. Rep. 703, at 708.

The Board and the Court below lose sight of the fact that ore haulage is not a carrier service, and hence the carrier has no employees in that service. The workers engaged in the ore haulage cannot be within the provisions of the Railroad Retirement Acts.

There is further conflict between the decision below and the decisions of the Interstate Commerce Commission and of the Utah Public Utilities Commission. The Circuit Court of Appeals for the Tenth Circuit casts doubts upon the trackage agreement. But the trackage license agreement (Ex. 18E, R. 195, 323) has continued in existence over the period of twenty-two years, with the knowledge and approval of the Interstate Commerce Commission and the State Commission, and has been construed by the Interstate Commerce Commission to have established and perpetuated a purely

private industrial interplant haulage of ore by the Mining Company from Mining Company's mine to Mining Company's reduction works, that neither was, nor is, in any manner related to, or a part of any function or operation of, a carrier.* The Interstate Commerce Commission on its own motion conducted an investigation into the legality of the similar license of the same date between Bingham and Garfield Railway Company and Utah Copper Company, and the Public Utilities Commission of the State of Utah did the same thing. A hearing was held at Salt Lake City, Utah, December 14, 15 and 16, 1921, both Commissions sitting. The investigation of the Interstate Commerce Commission was discontinued October 3, 1922. 73 I.C.C. 768. The proceeding before the Public Utilities Commission of Utah was disposed of by its report of January 26, 1923 in its Case No. 466. It found that:

> "The method of operating under the agreement now under investigation in this case is as follows:
>
> "The haul between the mine at Bingham and the mills at Magna and Arthur, is performed by the Copper Company for itself, in its own cars, with its own motive power and equipment and in trains manned by its own employees and crews. During the entire movement from the mine to the mills the ore is in the possession of the Copper Company itself."

Shortly after the conclusion of its investigation of the trackage agreement, the Interstate Commerce Commission conducted hearings with relation to certain settlements claimed under Section 209 of the Transportation Act of

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*Trackage agreements similar to that here involved were made contemporaneously between Bingham and Garfield Railway Company and Utah Copper Company, and Ray & Gila Valley Railroad Company and Ray Consolidated Copper Company, 138 I.C.C. 40, 45, 59.

1920 by the carrier here, by the Bingham and Garfield Railway Company and by Ray & Gila Valley Railroad Company. 138 I.C.C. 40, (Ex. 28E, R. 275, 376), 45, 59. The Commission held that even during the period before September 1, 1920, when the railway companies hauled the ores under published tariffs as within their common carrier operation, the mine and the mills were portions of one industrial plant. Thus, the Interstate Commerce Commission not only approved its order of dismissal in 73 I.C.C. 768, but applied the same conclusion to the period prior to September 1, 1920, when the carriers hauled the mining companies' ores under their published tariffs, by the carriers' equipment, manned by the carriers' employees:

> "* * * It is apparent that the primary purpose of the carrier's line is, and since its construction has been, to serve the needs of the industry. The record shows that the ore transported by this carrier was similar to the ore transported by the Bingham & Garfield Railway Company, as described in the report upon the claim of that carrier, 138 I.C.C. 45, issued contemporaneously with this report. The reduction of the ore necessitated its removal from the mine to a point where a large volume of water was available as well as large space for the deposit of waste. In practical effect, the mine and the mill are portions of one industrial plant. * * *
>
> "Under date of May 28, 1920, the carrier and the copper company entered into an agreement to become operative September 1, whereby the copper company took over the transportation of its ore from the mines at Ruth to the reducing works at McGill. The transportation of other traffic was to be performed by the carrier as before. The carrier transferred to the copper company the equipment to be used in the ore transportation. * * *" (138 I.C.C. at 42, 43.)

Even as late at January 27, 1933, the Interstate Commerce Commission again affirmed the position previously taken by it upon this subject.

> "* * * On May 28, 1920, the respondent and the copper company entered into an agreement, effective the following September 1, whereby the copper company took over the interindustry service of transporting the ore from its mine to its reducing plant. Other transportation was to be performed by the respondent as before. * * * On brief counsel for our bureaus point out that the apparent effect of this 1920 agreement was to reduce materially the respondent's net railway operating income in subsequent years, and consequently the amounts payable under section 15a of the act, and urge that an accounting should be had for every year that this agreement has been in force with a view to determining what the net railway operating income would have been during each of the respective years had it not been in force.
>
> "This agreement was considered by us in Guaranty Settlement with Nevada N. Ry., 138 I.C.C. 40. We there held that without doubt its purpose was to reduce the net railway operating income of the respondent, thus avoiding in a measure the effect of the recapture provisions of section 15a of the act, but that the transportation of the copper company's ore from the mine to the mill should be regarded as a plant service and not as 'general transportation'. This transportation of ore which the copper company has chosen to perform itself is merely a preliminary step in the process of preparing raw material for marketable use and as such is purely a plant service. The contention of the bureau is overruled. No adjustment of net railway operating income during the recapture periods will be made in respect to this item." Nevada Northern Railway Company Excess Income, Finance Docket No. 3856, 189 I.C.C. 415, at 434.

What is the present status of these trackage licenses? Are they valid, or are they void? Must these carriers be dissolved to permit the mining companies themselves to haul their ores from mine to mills?

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

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